In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

NO. 77-881

FRANK F. FASI, Mayor, City and County of Honolulu, FRANCIS A. KEALA, Chief of Police, Honolulu Police Department, City and County of Honolulu, and FRANCIS K. MATSUMOTO, Major, Honolulu Police Department, City and County of Honolulu,

Petitioners,

vs.

JAMES KAALAUKOA POKINI, aka James Akina, aka Poki,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

In the Supreme Court
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NO. _____

FRANK F. FASI, Mayor, City and County of Honolulu, FRANCIS A. KEALA, Chief of Police, Honolulu Police Department, City and County of Honolulu, and FRANCIS K. MATSUMOTO, Major, Honolulu Police Department, City and County of Honolulu,

Petitioners,

vs.

JAMES KAALAUKOA POKINI, aka James Akina, aka Poki,

Respondent.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter on July 29, 1977.

OPINIONS BELOW

The July 29, 1977, unreported opinion of the Court of Appeals appears in the Appendix, *infra*, at pp. 3-5. The prior order of the United States District Court for the District of Hawaii, dated July 7, 1975, appears in the Appendix, at pp. 1-2.

JURISDICTION

The judgment of the Court of Appeals was entered on July 29, 1977. A timely "Petition for Rehearing in Banc and Suggestion That Case Be Reheard in Banc" was denied on September 22, 1977; Appendix, at pp. 6-7. A "Motion to Stay Effect of Mandate Pending Application to Supreme Court for Writ of Certiorari" was sent to the Court of Appeals on October 11, 1977, but was not filed or considered. The jurisdiction of this Court is invoked pursuant to 28 USC Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether municipal officials may be liable under a "no-fault" or *respondeat superior* theory for the payment of attorney's fees in an action brought under 42 USC Sec. 1983, when there has been no showing of liability or wrongdoing on the part of any official or subordinate.

2. Whether the imposition of attorney's fees against municipal officials based upon a "no-fault" or *respondeat superior* theory conflicts with prior decisions of this Court holding that municipalities may not be sued under 42 USC Sec. 1983.

3. Whether the Civil Rights Attorney's Fees Awards Act of 1976, is applicable retroactively to services rendered, or suits completed at the trial level, prior to its effective date.

(a) If so, whether such fees can be awarded when there has been no determination by the trial court of which party is the prevailing party.

(b) If so, whether there exists the right to a determination by a jury concerning whether such fees should be imposed, or the amount of such fees to be imposed.

STATUTORY PROVISION INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559, 90 Stat. 2641, provides in relevant part:

"... '[I]n any action or proceeding to enforce a provision of section ... 1979 [42 USC Sec. 1983] ... of the Revised Statutes, ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.'."

STATEMENT OF THE CASE

This suit was brought under 42 USC Sec. 1983, by which Respondent challenged his segregated confinement at the Halawa Jail, which at that time was operated under the auspices of the City and County of Honolulu. Respondent had been confined at the jail since June, 1972, after having been sentenced on numerous felony charges and while awaiting trial on other pending charges.[1] On certain of those charges, Respondent had been sentenced to life imprisonment.

Respondent was placed in temporary segregated confinement on February 25, 1974, as the result of anonymous threats against his life; that confinement afforded Respondent greater security and provided the means for that degree of observation necessary for his safety. Thus, segregated confinement was not the equivalent of the solitary confinement in which a prisoner might be placed for punitive reasons. Visitation privileges were accorded Respondent for the only weekend involved by Petitioner Matsumoto, the officer in charge of the jail, who also ordered that Respondent's full recreational privileges be restored at the beginning of the following week. One hour after he returned to the general prison population on March 5, 1974, Respondent threatened three times to kill his cellmate, and requested a single cell.

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[1] Hawaii Criminal No. 44261 (Murder, 1st Degree); Hawaii Criminal No. 44262 (Robbery, 1st Degree); Hawaii Criminal No. 44324 (Robbery, 1st Degree); Hawaii Criminal No. 44263 (Murder, 1st Degree); Hawaii Criminal No. 44940 (Murder, 1st Degree); Hawaii Criminal No. 44325 (Robbery, 1st Degree).

Respondent then began to occupy a single cell again, the situation upon which he originally had based his suit.

Jurisdiction under 42 USC Sec. 1983, was predicated solely upon the absence of written rules and regulations delineating the specific procedures that would be followed whenever a change occurred in a prisoner's custodial status. Relying on the existing law regarding attorney's fees, Petitioners promulgated certain rules for the jail pursuant to an agreement entered into between the parties. The parties then incorporated into the final judgment rules that would be deemed to be a regular part of the administrative procedure of the jail; the judgment was filed in the United States District Court for the District of Hawaii on April 14, 1975. No showing ever was made that any Petitioner had deprived Respondent of any right, privilege or immunity; nor that any Petitioner had engaged in any wrongdoing or misconduct; nor that Petitioners Fasi and Keala had any connection with any activities involved in the suit other than their holding their respective positions as the Mayor of Honolulu and the Chief of Police of the Honolulu Police Department, who, under the municipal structure, were the superiors of Petitioner Matsumoto.

Later on April 14, 1975, counsel for Respondent filed a "Motion for Costs and Attorneys' Fees," in which he relied upon the "private attorney general" doctrine for the awarding of attorney's fees. Record on Appeal *in Forma Pauperis* to the United States Court of Appeals for the Ninth Circuit (hereinafter cited as R.), at 1. Subsequent to the filing of the motion, and prior to a ruling upon it, this Court denied the use of that theory in cases such as the instant suit, in *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975). Following that decision, Respondent submitted an "Amended Motion for Costs and Attorneys' Fees," based upon the "common benefit" theory. (R. at 33.) The District Court entered an order denying that motion on July 7, 1975. (R. at 46.) On August 1, 1975, Respondent filed his

Notice of Appeal to the United States Court of Appeals for the Ninth Circuit. (R. at 49.)

The final brief received by the Court of Appeals, the Reply Brief of Respondent, was submitted in February, 1976, some seven months prior to the approval on October 19, 1976, of the "The Civil Rights Attorney's Fees Awards Act of 1976," P.L. 94-559, 90 Stat. 2641 (hereinafter referred to as the Act). Before oral argument was set in the instant suit, the Court of Appeals ruled in *Stanford Daily v. Zurcher*, 550 F.2d 464 (9th Cir. 1977), *cert. granted*, 76-1484, 76-1600, 46 U.S.L.W. 3182, 3183 (Oct. 3, 1977), that Congress intended that the Act apply to all cases pending at the time of its enactment. Relying on *Stanford Daily*, the Ninth Circuit ruled against Petitioners herein. A "Petition for Rehearing in Banc and Suggestion That Case Be Reheard in Banc" was filed timely by Petitioners; an order denying that Petition was filed on September 22, 1977. This Petition ensued.

REASONS FOR GRANTING THE WRIT

1. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976, WAS RELIED UPON IMPROPERLY IN AWARDING ATTORNEY'S FEES SINCE THE COMPASS OF 42 USC SEC. 1983, INCORRECTLY WAS EXPANDED TO IMPOSE LIABILITY UPON PETITIONERS WITHOUT A TRIAL COURT DETERMINATION OF THEIR FAULT OR INVOLVEMENT, AND THEIR DUE PROCESS RIGHTS THUS WERE VIOLATED BY THAT INTERPRETATION.

The basic provisions of the Civil Rights Attorney's Fees Awards Act of 1976 (hereinafter cited as the Act), have not

been complied with in this proceeding. The Act permits the awarding of a reasonable attorney's fee in an action based upon 42 USC Sec. 1983, only when "the court, in its discretion," decides to award attorney's fees to "the prevailing party . . . ." Nowhere in the record of this action has there been a determination that Respondent is the prevailing party. The trial court did not even have an opportunity to decide whether to award such an attorney's fee since, in an ebullient exhibition of judicial tinkering, the Court of Appeals completely usurped the primary right of the trial court to make that determination after the passage of the Act. Furthermore, Petitioners never had an opportunity to argue that they were the prevailing parties. At no time during the pendency of this suit at the trial court level or during the period in which briefs were submitted to the appellate court could an attorney's fee have been awarded under the Act. Had this been possible, of course, different considerations would have been present that would have affected the strategy taken by Petitioners at the trial court level.

Petitioners in this action were sued in their official positions as the Mayor, the Chief of Police and the officer in charge of the Halawa Jail. Respondent sued solely on his own behalf and not as the spokesman for a larger group of inmates or prospective inmates. The only finding made by the trial court about the behavior of Petitioners was that Petitioners did not act in bad faith. (Order of July 7, 1975.) The record itself does not indicate that Petitioners participated in, had knowledge of, or were negligent with regard to any act that purportedly deprived Respondent of his rights, privileges or immunities under 42 USC Sec. 1983.

Notwithstanding the notable absence of the proof of Petitioners' involvement under color of state law that would be necessary to establish a violation of 42 USC Sec. 1983, *Paul v. Davis*, 424 U.S. 693 (1976), and notwithstanding a line of cases that would hold supervisory personnel liable only when that evidence was forthcoming, the Court of

Appeals imposed a form of strict liability or a theory of *respondeat superior* upon Petitioners by assessing against them the attorney's fees. The ultimate irony appears when it is learned that the prisoner was returned to the general prison population prior to any of the substantive actions in this case, and that the fees mainly were incurred after the prisoner was returned by his own request to the very status, segregated confinement, that he had contested by precipitating this litigation.

Holding Petitioners liable for attorney's fees under these circumstances is not equitable, and is contrary to a significant body of federal case law, as well as several hundred years of common law tradition, holding supervisory officers not strictly liable for the acts of their subordinates. *See Goode v. Rizzo*, 506 F.2d 542 (3d Cir. 1974), *rev'd on other grounds*, 432 U.S. 362 (1976). If Petitioners had been sued by Respondent for money damages under 42 USC Sec. 1983, they would have enjoyed a qualified immunity (especially when they have shown good faith), of which the precise parameters apparently have not been determined. *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Pierson v. Ray*, 386 U.S. 547 (1967). Notwithstanding that immunity, which Petitioners never had an opportunity to assert, the Court of Appeals awarded against them expenses that are characterized as "costs," but that in reality are a punitive form of damages.

Liability under the theory of strict liability or *respondeat superior* espoused *sub silentio* by the Court of Appeals is infinitely expandable to include the imposition of attorney's fees on any person in any chain of command. Such a ruling serves ineluctably to decrease interest in government service. What reasonable citizen would want to serve as mayor of a city, if this ruling is upheld, when that person could be liable *personally* for the payment of attorney's fees for an alleged act of a police officer with whom he has had no contact and

of whose actions he has had no knowledge?[2]

This egregious defect in the lower court's decision justifies the granting of certiorari to review that ruling.

2. THE RULING OF THE APPELLATE COURT CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT IN THAT IT PERMITS PENALTIES TO BE LEVIED AGAINST MUNICIPAL OFFICIALS SOLELY BECAUSE OF THEIR OFFICIAL POSITIONS AND NOT DUE TO ANY FAULT OR LIABILITY ON THEIR PART.

The decision by the Court of Appeals creates a precedent that conflicts with prior decisions of this court. In *Monroe v. Pape*, 365 U.S. 167 (1961), this Court held that a municipal government is immune from a lawsuit brought under 42 USC Sec. 1983; *Moor v. County of Alameda*, 411 U.S. 693 (1973), extended that principle to county governments. These two cases, in conjunction with *Edelman v. Jordan*, 415 U.S. 651 (1974), make it reasonably clear that an award of attorney's fees that must be paid from city or county funds is not permissible. (Emphasis to this position in the present suit is supplied by the conspicuous absence of the City and County of Honolulu, which controlled the jail, as a party to the litigation.) The ruling of the Court of Appeals raises the problem whereby public officials become responsible for the payment of large sums of money, despite the absence of any finding of wrongdoing on their part and in direct contrast to a finding that they had not acted in bad faith, simply because of the positions they occupy in the municipal

[2]Unlike the situation in *Stanford Daily v. Zurcher*, 366 F. Supp. 18, 25 (1973), *aff'd*, 550 F.2d 464 (1977), *cert. granted*, 76-1484, 76-1600, 46 U.S.L.W. 3182, 3183 (Oct. 3 1977), Petitioners cannot seek solace from an ameliorative statute such as California Government Code, Sections 825, *et seq.*, in which a judgment against a public official would be paid by the governmental employer if that official acted within the scope of his duty.

structure.

Petitioners were held liable by the appellate court under the theory that merely by occupying administrative positions in an organizational structure, they assume personal responsibility for all activities of their subordinates. This, of course, is the novel declaration of a strict liability or *respondeat superior* theory of civil rights liability devised by the Ninth Circuit Court of Appeals. If the individual Petitioners are found to be liable solely because of their official positions and not because of any active or consenting participation in activities that presumably gave rise to Respondent's suit, then the Ninth Circuit decision essentially allows the City as a municipality to be liable for attorney's fees. *See In re Ayers*, 123 U.S. 443 (1887); *Sundry African Saves v. Madrazo*, 26 U.S. 110 (1828). (For Petitioners to be liable for the payment of any costs, they should have been sued personally, and not in their official positions, as they were here.) To allow this ruling to remain unexamined would result in the rationale of the above cases being vitiated through a tangential attack and would lead to the eventual eradication of those decisions.

It is no argument to state that such costs can be assessed in proceedings that seek mainly injunctive relief, in which monetary awards have been made on occasion.[3] An examination of those cases clearly reveals that the awards have been allowed against officials only when those officials had encouraged the alleged wrongdoing or had acquiesced in that wrongdoing after they had knowledge of its occurrence. In this proceeding, Petitioners had no notice of any wrongdoing, and the only possible wrongdoing was the absence of written rules concerning changes in custodial status. No finding was made of any unconstitutional, improper or wrong conduct on the part of any Petitioner. Finally, Petitioners moved imme-

[3]*See, e.g. Schnell v. City of Chicago*, 407 F.2d 1084 (7th Cir. 1969); *Hernandez v. Noel*, 323 F. Supp. 779 (D. Conn. 1970).

diately to improve the situation complained of by Respondent through the institution of written rules applicable to transfers within the jail.

The appellate court's ruling that permits the assessment of attorney's fees based solely upon the municipal structure conflicts with this Court's decisions and review of that judgment should be granted.

3. THE RETROACTIVE APPLICATION OF THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1979, DEPRIVED PETITIONERS OF THE DUE PROCESS OF LAW GUARANTEED THEM UNDER THE CONSTITUTION BY ASSESSING AGAINST THEM A SEVERE PENALTY WITHOUT AN OPPORTUNITY FOR A HEARING ON THE MERITS.

Prior to the trial court's decision on the question of attorney's fees, this Court ruled against the initial theory upon which Respondent had based his request for such fees. *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975). While this case was on appeal to the Ninth Circuit and after all briefs had been submitted, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976 (hereinafter cited as the Act). Upon appeal, the Ninth Circuit held that the Act applied retroactively to this case, basing its decision upon its own ruling in *Stanford Daily v. Zurcher*, 550 F.2d 464 (1977), *cert. granted*, 70-1484, 76-1600, 46 U.S.L.W. 3182, 3183 (Oct. 3 1977).

The Act does not specify that it would apply to cases such as this case in which all trial court proceedings had been completed when the Act was enacted, and in which an appeal had been taken regarding only the question of attorney's fees. Since the Act is straightforward and clear on its face, no resort should be made to legislative history. Furthermore, the legislative history does not state clearly that the Act should be applied in suits such as this. The Ninth Circuit relied upon its own legerdemain in determining which of the parties was the prevailing party, and then made its award of attorney's

fees by judicial fiat.

While these fees have been characterized as "costs," they should be examined for the effect of their imposition, not by the label placed upon them. Clearly, this assessment imposes a penalty upon Petitioners that is greater than any burden that could have been foreseen at the inception or the completion of this suit at the trial court level. *Cf. Edelman v. Jordan, supra.* The assessment of such substantial sums, so far in excess of the traditional concept of "costs," creates the need for Petitioners to have access to a trial by jury in order to determine the applicability of such an award. As this Court has determined that the right to trial by jury exists in certain cases of contempt, due to their serious nature, *Bloom v. Illinois* 391 U.S. 194 (1968), thus it also should determine that the same right exists in proceedings such as this suit.

The Act also requires that the award of attorney's fees must be made in the "discretion" of the court. Traditionally this concept has been applied to the power of the trial court to make certain determinations based upon its own perceptions and its immediate and primary familiarity with the case; it is not an authority vested in an appellate court that, of necessity, must rely solely upon the cold record. Ignoring this concept, the Ninth Circuit summarily awarded attorney's fees without granting to the trial court an opportunity to make the necessary determination with reference to the Act, and without permitting Petitioners an opportunity to argue their position in reference to the Act.

This Court held in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), that an appellate court should apply the statutory law in effect at the time its decision is rendered unless by doing so manifest injustice would result. A tripartite test that had been established in earlier cases, *United States v. Schooner Peggy*, 1 Cranch 103, 2 L.Ed. 49 (1801); *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268 (1969), is applied to determine whether that injustice would occur. The test examines "(a) the nature and

identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." 416 U.S. at 717.

When the instant case is examined with those criteria, manifest injustice clearly would result if the appeliate decision is upheld. Petitioners have been sued in their official capacities as officers of the Honolulu Police Department and as the administrative head of the City and County of Honolulu. Respondent was a prisoner who had been placed in segregated confinement for his protection (as Petitioner Matsumoto had a duty to protect Respondent from any harm that might befall him during his incarceration), and who then later was placed in segregated confinement at his own request.

The alleged deprivation of Respondent's rights was the initial placing of Respondent in segregated confinement without the availability of written rules regarding that removal from the general prison population. Furthermore, the "right" allegedly involved did not reach the high level of those special rights that earlier had received Congressional attention in the awarding of attorney's fees. *See, e.g.* 42 USC Secs. 2000a-3(b) (public accommodations), 2000e-5(h) (employment), 3612(c) (housing). Any expansion of these select and important categories should be interpreted narrowly and not applied retroactively to parties who could not anticipate such a change.

The passage of the Act creates an intolerable burden upon Petitioners by imposing upon them a substantial penalty that must be paid personally, even though there has been no finding of liability or fault on their part. Such a situation is a paradigm of the manifest injustice that would occur should the Act be applied retroactively to this proceeding. *Bradley v. Richmond School Board, supra*, does not control this suit and the lower court's decision should be reviewed to correct this error.

4. THE CASE RELIED UPON BY THE APPELLATE COURT IN DECIDING THIS SUIT IS INAPPOSITE, AND HAS BEEN GRANTED REVIEW BY THIS COURT; THUS IT WOULD BE INEQUITABLE TO LET THE INSTANT DECISION REMAIN UNEXAMINED.

Grave injustice would be done to Petitioners if this case remains unexamined while *Stanford Daily v. Zurcher, supra*, is reviewed by this Court. The likely reversal of *Stanford Daily*, the only case upon which the Court of Appeals relied in deciding this suit, would result in the anomaly by which the precedent case would be corrected while its progeny would remain as a legal grotesquery destined to be filed away, ignored and embarrasing, in a drawer of judicial quirks.

A perusal of the District Court opinion in *Stanford Daily v. Zurcher, supra*, which was adopted by the Ninth Circuit, 550 F.2d at 464, reveals the dissimilarities of that case when compared with this suit. There, the court treated the award of attorney's fees as a remedy that would effectuate a congressional policy. The basis for that rationale was that such an award vidicated important constitutional rights, supplemented otherwise inadequate remedies, was consistent with other congressional policies, and was appropriate because of the high social value placed upon the rights involved.

In this suit, the benchmark constitutional rights of the Fourth Amendment, which were involved in *Stanford Daily*, are not present. The remedies in the present suit were complete; they were not merely theoretical or remedies undertaken simply because of a "point of law." Moreover, unlike cases relied upon by the District Court in *Stanford Daily*, action was taken immediately by Petitioners even though it was not necessary to the resolution of the suit since Respondent already had been returned to the general population. Furthermore, the assessment of an attorney's fee against Petitioners would hamper effective action by public

officials since any action they might take would make them subject to strict and personal liability for any attorney's fees assessed in such cases despite no fault or liability on their part.[4]

Therefore, in order to prevent substantial injustice to Petitioners, review should be granted.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals.

DATED at Honolulu, Hawaii: December 1, 1977.

Respectfully submitted,

BARRY CHUNG,
Corporation Counsel
JAMES E. ROSS,
RANDOLPH R. SLATON
Deputies Corporation Counsel
Counsel for Petitioners

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[4] *See* n. 2, *supra*.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

JAMES KAALAUKOA POKINI,
aka James Akina, aka Poki,
Plaintiff,

v.

FRANK F. FASI, Mayor,
City and County of Honolulu, et. al.,
Defendants.

Civil No. 74-42
Filed July 7, 1975

ORDER DENYING AMENDED MOTION FOR ATTORNEYS' FEES AND COSTS

The above-entitled Motion having come up for hearing on June 26, 1975 at 3:30 p.m. before the Honorable Samuel P. King, and the Court having found the reasonable value of the legal services rendered by Plaintiff's attorneys in the course of the above-entitled case to be $5,000.00, and, further, that the Defendants did not act in bad faith during the course of said case;

IT IS HEREBY ORDERED that Plaintiff's Amended Motion for Attorneys' Fees and Costs herein shall be and is

hereby denied.

DATED: Honolulu, Hawaii, July 7, 1975

/s/ Samuel P. King /seal/
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

/s/ Dennis W. Potts
DENNIS W. POTTS
Attorney for Plaintiff

/s/ William M. Kahane
WILLIAM M. KAHANE
Attorney for Defendants

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES KAALAUKOA POKINI,
aka James Akina, aka Poki,

Appellant,

v.

FRANK F. FASI, Mayor, City and County of Honolulu, FRANCIS KEALA, Chief, Police Department, City and County of Honolulu, and FRANCIS K. MATSUMOTO, Officer in Charge, Honolulu Jail, City and County of Honolulu,

Appellees.

No. 75-3039

Filed July 29, 1977

MEMORANDUM

Appeal from the United States District Court
for the District of Hawaii.

Before: ELY, HUFSTEDLER, and WRIGHT, Circuit Judges

The appellant initiated an action under 42 U.S.C. § 1983 (1970), charging that the Halawa Jail administration had segregated him from other prisoners and had deprived him of

other standard rights and privileges without conducting a prior hearing. Following extended negotiations that can be inferred, the parties stipulated to a judgment under which the defendants agreed to adopt certain procedures governing the future transfer of prisoners. The appellant thereafter moved for attorneys' fees. The district court found that the appellant's attorneys had invested time and effort reasonably valued at $5,000, but nevertheless denied the motion on the basis of the Supreme Court's then recent decision in *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). This appeal followed.

While the instant case was pending on appeal, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1974 (Act), Pub. L. No. 94-559, 90 Stat. 264 (1976), which modified *Alyeska* by adding the following language to 42 U.S.C. § 1988:

> "*In any action or proceeding to enforce a provision of sections* 1981, 1982, *1983*, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, *the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.*"
> (Emphasis supplied.)

As previously noted, the District Court, at the time it decided the appellant's motion, did not have the benefit of this amendment, which was an explicit Congressional response to *Alyeska*.

Congress indisputably intended the Act to apply to cases, like this, pending at the time of enactment, and our Court recently has so held. *Stanford Daily v. Zurcher*, 550 F.2d 464, 465-66 (9th Cir. 1977). In these circumstances, and in

the light of the District Court's finding with respect to the value of services rendered by appellant's attorneys,[1] no useful purpose would be served in remanding to the District Court for purposes of deciding the impact of the Act as to attorney's fees in this case. Accordingly, the challenged Order is reversed, and upon remand, the District Court will allow to the plaintiff, as costs, the sum of $5,000 for the services of his attorneys. Additionally, we hold that the appellant will be allowed, as costs, an additional $1,000 for the services of his attorneys in connection with this appeal.[2]

Reversed and Remanded, with directions.

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[1] During oral argument, and in reply to a specific question put from the bench, counsel for the appellees agreed with the District Court's finding that the value of the services rendered to the appellant in the trial court was $5,000. In a supplemental document filed by the appellees, it appears that their counsel is, in effect, attempting to renege on the concession. That, we will not permit.

[2] We called for supplemental statements as to the value of the appellate work done for appellant's attorneys. The appellant put forward a claim for an additional $5,000, while the appellees, quite curiously, state that the services were worthless. The appeal was well-briefed for the appellant, but since the issue was relatively simple, we have concluded that an additional $1,000, when considered with the $5,000 award, is a fair allowance as to all parties.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES KAALAUKOA POKINI,
aka James Akina, aka Poki,
Appellant,

v.

FRANK F. FASI, Mayor, City and County of Honolulu, FRANCIS KEALA, Chief, Police Department, City and County of Honolulu, and FRANCIS K. MATSUMOTO, Officer in Charge, Honolulu Jail, City and County of Honolulu,

Appellees.

No. 75-3039
Filed Sept. 22, 1977

ORDER

Before: ELY, HUFSTEDLER, and WRIGHT, Circuit Judges.

The judges constituting the panel originally concerned with the subject case (Ely, Hufstedler, and Wright), have unanimously voted to deny the Petition for Rehearing and to reject the suggestion for en banc rehearing.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a

vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The Petition for Rehearing is denied, and the suggestion for rehearing en banc is rejected.